Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

81-2240

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA and
ROBERT G. BRITTON,
COMMISSIONER,

Petitioners,

V.

DANNY RAY MYLAR a/k/a
DANNY RAY MILES,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

TABLE OF APPENDICES

	PAGE
APPENDIX "A", ORDERS AND OPINIONS OF THE DISTRICT COURT	1
JUDGMENT	1
MEMORANDUM OPINION	2
APPENDIX "B", OPINIONS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	88
OPINION	88
JUDGMENT	99
DENIAL OF REHEARING	101
STAY OF THE MANDATE	103
APPENDIX "C", 28 UNITED STATES CODE 2254	105
APPENDIX "D", OPINIONS OF THE ALABAMA APPELLATE COURTS	112
OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA	113
ORDER OF THE SUPREME COURT OF ALABAMA	124
CERTIFICATE OF SERVICE	125

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED APR 21 1981
United States District Court
Northern District of Alabama
James E. Vandegrift, Clerk
ENTERED APR 21 1981

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	:	
Petitioner,	:	
-vs-	:	
ROBERT G. BRITTON, Commissioner, Alabama and Board of Corrections and THE STATE OF ALABAMA,	:	NO. CV 79-A-1420-S
Respondents.	:	

JUDGMENT

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is hereby ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by Danny Ray Mylar pursuant

to 28 U.S.C. § 2254 be and the same hereby is DENIED.

DONE this 21st day of April, 1981.

/S/C.W.Allgood
SENIOR JUDGE

A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/ Jane T. Deane
DEPUTY CLERK

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	:	FILED APR 21 L981 United States District Court
Petitioner,	:	Northern District of Alabama
-vs-	:	James E.Vandegrift Clerk
ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections and	:	ENTERED APR 21 1981
THE STATE OF ALABAMA,	:	NO. CV 79-A-1420-S
Respondents.	:	

MEMORANDUM OF OPINION

This matter is before the court on a

petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama, 28 U.C 2254, and the recommendation of United States Magistrate Edwin L. Nelson.[1/] Danny Ray Mylar, hereinafter referred to as petitioner, was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division on an indictment charging him with first degree murder and sentenced to life imprisonment.

This is the second habeas petition filed by petitioner. His first (CA 78-A-0071-S) was dismissed by the court for failure to exhaust state remedies. The present petition is essentially identical to the first petition with the addition

---

1/A copy of the magistrate's Examination, Report and Recommendation for this case and the Examination, Report and Recommendation in CA 78-A-0071-S are attached hereto as Appendix A and B, respectively.

of a claim that his attorneys were constitutionally inadequate.

FACTS AND PROCEEDINGS

The two opinions of the magistrate accurately set out the facts concerning the crimes and issues before the court. The recitation of the facts and proceedings in the magistrate's opinions in both this case and CA 78-A-0071-S are adopted here.[2/]

CLAIMS

Petitioner asserts a number of claims as grounds for habeas relief. The magistrate's two previously mentioned Examination, Report and Recommendations contain an accurate analysis and discussion of these claims. The magistrate's recommendations for all the claims except the

---

2/No party has objected to the magistrate's recommendation. On its own the court has reviewed the record and declines to accept the recommendation as to one claim.

claim of ineffective assistance of counsel on appeal are hereby accepted and his holding and discussion on those issues is adopted here.

EFFECTIVENESS OF COUNSEL

The magistrate held that petitioner was denied effective assistance of counsel due to the failure of counsel to file an appellate brief. The court disagrees with that holding. Accordingly, that part of his recommendation is overruled.

It is undisputed that petitioner's court appointed counsel did not file a brief on the initial appeal. The conviction was affirmed on the record submitted. The Court of Appeals stated that it had "carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none." The question then arises whether petitioner was denied his right

to effective assistance of counsel. The standard utilized by the Fifth Circuit in determining whether counsel was ineffective is whether the petitioner was represented by "counsel reasonably likely to render and rendering reasonably effective assistance." Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1979). Applying this standard to petitioner's case, petitioner was not denied effective assistance of counsel. Section 12-22-240 of the Code of Alabama 1975 requires the Alabama Court of Criminal Appeals to "consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands." Due to this statute, appellants in criminal cases in Alabama are not required to file briefs. Watts v. State, 337 So.2d 91 (Ala.Cr.App. 1976); Youngblood v. City of

Birmingham, 338 So.2d 526 (Ala.Cr.App. 1976). Alabama appellate courts on many occasions have reversed criminal convictions on points not raised in brief or when no brief at all was filed. See Bertelsen v. State, 20 Ala.App. 539, 103 So. 480 (1925); French v. State, 28 Ala. App. 147, 180 So.2d 592 (1938); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Cowart v. State, 44 Ala.App. 201, 205 So.2d 250 (1967). It is very possible that counsel for petitioner, after examining the trial record, believed it was the best strategy to have the Alabama Court of Criminal Appeals search the record for error. Furthermore, it should be noted that counsel for petitioner did file a brief seeking a rehearing before the Alabama Court of Criminal Appeals. When that rehearing was denied, the attorney petitioned the Alabama Supreme Court for a writ of certiorari. He filed

a brief along with the application for certiorari.

Effective Counsel is interpreted by the Fifth Circuit to mean not errorless counsel, and not counsel judged ineffective by hindsight. Herring v. Estelle, supra. The fact that petitioner's counsel chose to wait and file a brief only in application for rehearing may appear questionable in hindsight, but is not so negligent to be considered a violation of petitioner's constitutional rights. Although the Court of Appeals is not required to grant a rehearing when a brief is not filed on the original appeal or to consider issues subsequently raised, it may in its discretion do so. Watts v. State, supra. Counsel for petitioner allowed the Alabama Court of Criminal Appeals to search the record on direct appeal and then filed a brief seeking a rehearing when the conviction

was affirmed on direct appeal. It is very possible that counsel believed that this was the best way to obtain an extensive review of his client's case.

The State of Alabama has chosen to establish a system of review whereby the appellate court has a statutory duty to search the record for error. In accordance with that practice, counsel for appellants are not required to file briefs. Although this may not appear to be the best way to handle criminal appeals, it is not necessarily constitutionally invalid. Comity dictates that deference be given to the method the State of Alabama has chosen for considering criminal appeals. The Tenth Circuit has held on facts almost identical to these that the failure to file a brief was not ineffective assistance of counsel. See Hill v. Page, 454 F.2d 679 (10th Cir. 1971). Furthermore, it should

be noted that this system of appellate review applied equally to defendants with retained counsel and indigents with appointed counsel.

The magistrate, in his recommendation, relied on Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979). Although the facts are very similar, one important fact makes the cases distinguishable. The Texas appellate court was under no statutory duty to search the record as was the Alabama Court. An attorney in Alabama can reasonably rely upon that statutory duty to secure a meaningful review of his client's case. The Texas lawyer has no way of knowing whether the appellate court will examine the record and grant his client a meaningful review. The existence of this statutory duty is the critical difference in concluding that counsel's assistance in the case at bar was not ineffective.

In accord with the above and the magistrate's recommendation, this court must conclude that all of petitioner's claims are without merit. Accordingly, the petition for writ of habeas corpus relief is due to be DENIED. An appropriate judgment will enter.

DONE this 21st day of April 1981.

/s/ C.W.Allgood
CLARENCE W. ALLGOOD,
SENIOR JUDGE
UNITED STATES
MAGISTRATE

A TRUE COPY
JAMES E. VANDEGRIFT, Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/ Jane T. Deane
DEPUTY CLERK

* * * * *

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES, :

Petitioner, :

-vs- : NO. CV 79-A-1420-S

ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections and THE STATE OF ALABAMA, :

Respondents.:

EXAMINATION, REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama. 28 USC 2254(b). Danny Ray Mylar was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division on an indictment charging first degree murder and was sentenced to life imprisonment. The Alabama Court of Criminal Appeals affirmed, 343 So.2d

801 (1977), and certiorari was denied in the Alabama Supreme Court, 343 So.2d 806 (1977).

This is the second petition by Mylar. His first (CA78-A-0071-S) was dismissed on recommendation of the magistrate for failure to exhaust state remedies. In that case the court considered transcripts of Mylar's trial, the record on appeal from the denial of his coram nobis petition, and a transcript of his preliminary hearing, making a record of more than 700 pages. Mylar also submitted numerous handwritten documents, some of which were poor quality photostatic copies, making a stack approximately three inches thick. Because a considerable amount of time and effort was involved in analyzing the entire record and because Mylar's failure to exhaust remedies as to one question did not become clear until after a great deal of

effort had been expended, the magistrate felt that it would be most efficient to write to those issues on which state remedies had been exhausted. Mylar now alleges that he has exhausted state remedies on the remaining issue. That is not contested by the respondents.

The present petition is essentially identical to the original and the magistrate's opinion in CA 78-A-0071-S with regard to most issues is adopted here.[1/] However, Mylar's claims with regard to the testimony of Samuel Yarber requires additional consideration and his claim that his attorneys were constitutionally inadequate must be considered for the first time.

THE RECORD

The entire record which is available

[1/] A copy of the Examination, Report and Recommendation dated April 18, 1979, is attached hereto as Appendix A.

to the court in CA 78-A-0071-S is likewise available now. Additionally, the petitioner has submitted a transcript of a hearing on a motion by Samuel Yarber to suppress prior statements and testimony at Mylar's preliminary hearing made by him. That record will also be considered here.

FACTS

The previous opinion of the magistrate set out the facts concerning the crimes of which Mylar and Yarber were convicted. This addition is necessary to the issues considered here.

Within days after the bodies of Mrs. Clarice Knabe and Ronald Harvell White were discovered, the petitioner Danny Ray Mylar and Samuel Yarber were separately taken into custody and questioned by officers of the Birmingham Police Department and the Jefferson County Sheriff's Department. The arresting

officers made a conscious decision that they would not advise Samuel Yarber of his right to remain silent and his right to counsel. Some went so far as to promise that he would not be prosecuted for any crime arising out of the incident in which Mrs. Knabe and Mr. White were robbed, kidnapped, Mrs. Knabe raped, and both murdered. Because of the failure of the officers to advise Yarber of his rights and the promises made to him, he gave a statement implicating Mylar which was consistent with the facts stated by the Alabama Court of Criminal Appeals. See the Examination, Report and Recommendation, Appendix A, pp. 6-7. Yarber was then released from custody but officers were assigned to remain with him, ostensibly for his protection. In truth, according to testimony at Yarber's trial, the officers were afraid that, left to his own devices, Yarber would flee the

state and become unavailable as a witness to testify against Mylar. Testimony from the various officers was to the effect that they fully intended to fulfill their agreement not to prosecute Yarber.

Later Yarber appeared at a preliminary hearing on Mylar's case and testified against him. Apparently, the state district judge ordered that a warrant be issued for the arrest of Yarber after hearing his testimony at this hearing. Yarber was tried for murder and convicted in February of 1976. At a hearing conducted just prior to the beginning of his trial, the court granted a defense motion to suppress Yarber's prior statements and his testimony at Mylar's preliminary hearing. It denied a motion to dismiss the indictment. Mylar testified against Yarber at that trial.

At Mylar's trial, Yarber was called to the witness stand but refused to

answer any question whatsoever even though the court found him in contempt. His testimony given at Mylar's preliminary hearing was read to the jury over defense objections.

YARBER'S TESTIMONY

The petitioner claims here as he did before that he was convicted on the uncorroborated testimony of an accomplice. That claim was found to be without merit by the magistrate 2/ on the first petition and no compelling reason has been presented why it should be reconsidered here.

The magistrate also found without merit Mylar's claim that Yarber's testimony should have been admitted because it had previously been suppressed.3/ Relying on United States v. Dowdy, 486 F.2d

---

2/Appendix A, p. 8.

3/Appendix A, p. 9.

1042 (5th Cir. 1973), the magistrate noted that Yarber's Fifth Amendment privilege against self-incrimination was personal and could not be vicariously asserted by Mylar. Through retained counsel, Mylar argues now that Dowdy, supra., is a correct statement of the law, but seeks to distinguish it by arguing that while it is applicable to statements made by persons not aware of their right to remain silent, it should not be applicable to statements which are actually coerced or otherwise improperly induced. No reported case has been found in which any court has accepted the distinction argued by the petitioner. It has long been firmly recognized that the privilege against self-incrimination is personal to the witness. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50

L.Ed 652 (1906); Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951); Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 81 S. Ct. 1347, 6 L.Ed.2d 625 (1961). The right may not be vicariously asserted. United States v. Colyer, 571 F.2d 941 (5th Cir. 1978); United States v. Rubin, 559 F.2d 975 (5th Cir. 1977); Hall v. United States, 413 F.2d 45 (5th Cir. 1969); Sharp v. United States, 410 F.2d 969 (5th Cir. 1969); United States v. Mayes, 512 F.2d 637 (6th Cir. 1975); United States v. Zoura, 497 F.2d 1001 (7th Cir. 1973); United States v. Howell, 470 F.2d 1064 (9th Cir. 1972). Even if there is doubt whether the witness knowingly and voluntarily waived the right against self-incrimination, the defendant has no right to assert the violation of the witness' Fifth Amendment right. United States v. Wise, 603 F.2d

1101 (4th Cir. 1979).

The Fifth Circuit has recently held that defendants in a drug conspiracy case would not be permitted to assert in their own behalf, the violation of Fifth Amendment rights of a witness even though statements and testimony of the witness had been obtained in circumstances strongly suggesting psychological coercion. United States v. Fredericks, 586 F.2d 470 (5th Cir. 1978).

The circumstances under which Yarber's statement and testimony were secured most assuredly do not rise to the level of physical torture or unremitting prolonged interrogation condemned as violative of due process in Bradford v. Johnson, 354 F.Supp. 1331 (E.D.Mich. 1972), aff'd., 476 F.2d 66 (6th Cir. 1973); see also LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974), cert.denied, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d

674 (1974).

On his first petition, Mylar argued that Yarber's preliminary hearing testimony should not have been admitted because no proper predicate was layed. Focusing on the confrontation/cross-examination issue, the magistrate found against him. Appendix A, pp. 9-12. Except for noting that the Supreme Court decision in Ohio v. Roberts, ___ U.S. ____, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) lends further support to the court's opinion, no further discussion is necessary on that aspect of the claim. In the present petition, however, Mylar has expanded his argument to include a claim that Yarber's unavailability was procured through acts of the State of Alabama in withdrawing the promise of immunity previously made to him.

The prosecution may not use the prior testimony of a witness whose unavailabil-

ity at trial was caused by its own fault. Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (Declarent's absense "was plainly to be attributed to the negligence of the prosecution" which had released the witness without bail "in charge, not of an officer, but of another witness for the government.") The state must make a reasonable effort to secure the live testimony of its witnesses. Ohio v. Roberts, supra.

Ordinarily, a co-defendant who claims the privilege at trial after testifying at an earlier proceeding is unavailable for hearsay purposes. Woodward v. State, 21 Ala.App. 417, 109 So. 119 (1926). See United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). Compare rule 804(a), Federal Rules of Evidence. The courts have consistently held that a grant of immunity is discretionary and the prose-

cutor has no constitutional obligation to seek immunity for a witness. United States v. Herman, 589 F.2d 1191 (3rd Cit. 1978); United States v. Lang, 589 F.2d 92 (1978). In Alabama prosecuting attorneys and judges have discretionary authority to grant immunity from prosecution in exchange for truthful testimony as a state witness. Gibson v. State, Ala.Cr. App., 375 So.2d 504, 511 (1978), aff'd., 375 So.2d 514. Prosecutors may initially choose not to prosecute a particular defendant. See Cates, Can We Ignore Laws? - Discretion Not to Prosecute, 14 Ala.L.Rev. 1 (1961).4/

4/A number of Alabama statutes provide for immunity in specified circumstances:

Alabama: Ala. Const. art. VIII, §189 (1901)(Contested elections; immunity from prosecution for persons other than an accused); Ala. Code 1975, § 6-6-181, (creditors' bills for discovery; immunity [continued on next page]

In order to prevail on this aspect of his claim, Mylar "must be prepared to show that the [state's] decisions were made with the deliberate intention of

---

(continued fn. 4)

from use on an indictment for fraud; id, § 8-1-130, (illegal contracts for future delivery; immunity from use, and pardon for the offense); id, § 8-1-157, (actions on gaming contracts; immunity from prosecution for party); id, § 13-7-29,(testimony before grand jury in gaming and lottery cases; immunity from prosecution); id, § 17-15-3, (contested elections; testimony as to illegal vote; immunity from prosecution for voting at such election if testimony is full and true); id, § 25-4-141, (industrial relations; immunity from prosecution); id, §§ 28-4-317 and 24-8-318, (liquor law; testimony before grand jury; same); id, § 28-4-320, (liquor law, immunity from prosecution and use for agent, employee or principal); id, § 28-4-321, (liquor law violation; immunity from prosecution); id, § 28-4-134, (same, immunity from use); id, § 28-4-272, (proceeding for seizure of liquors; immunity from prosecution and use); id, § 37-1-91, (public service commission;immunity from prosectuion); id § 37-8-4, (testimony before grand jury as to railroad rate offenses; same); id, § 40-2-20, (department of revenue; same).

distorting the judicial factfinding process." United States v. Herman, supra., at 1204. As reprehensible as the conduct of the law enforcement officers was, the record does not support a finding that the fact-finding process was intentionally or otherwise distorted. It is perfectly clear that at least some of the officers who participated in the interrogation of Samuel Yarber deliberately violated his rights by withholding the Miranda warning. They compounded the violation by promising him immunity from prosecution knowing it was a promise they probably could not keep. In Alabama, law enforcement officers have no authority whatsoever to grant immunity from arrest or prosecution to an accused. Yarber v. State, 368 So.2d 868, Ala.Cr. App. (1978), cert. denied, 368 So.2d 871 (1978); Yarber v. State, 375 So.2d 1212, Ala.Cr.App. (1977), rev. on other

grounds, 375 So.2d 1229 (1978), aff'd. on remand, 375 So.2d 1231, Ala.Cr.App. (1978), rev. on other grounds, 375 So.2d 1231, Ala.Cr.App. (1978), rev. on remand, 375 So.2d 1236, Ala. Cr.App. (1979). Likewise, prosecuting attorneys are without authority to grant immunity to an accused. As noted by the Alabama Court of Criminal Appeals:

> [T]o clothe them with such power and authority would strike at the very heart of our system of criminal justice and oust the courts of power invested in them by the constitution and statutes.

Gibson v. State, supra., at 511.

In order to prove this claim, Mylar would have to show that the officers had no intention of trying to keep their promises and that they accurately predicted the course which events would take in connection with their investigation which was at that time in its very early stages. The officers

testified that when Yarber gave his statement he was not then a suspect and that they fully intended to keep their promise to the extent that they could. Yarber was not, in fact, charged until after Mylar's preliminary hearing when the presiding judge at that hearing ordered his arrest.

It is extremely unlikely that those officers could have predicted the course which their case would take, for that course was, to a large extent, dependant upon the discretionary decisions of officers not then involved. The robbery of the 2010 Lounge and the kidnapping of Mrs. Knabe and Mr. White occurred in the City of Birmingham within the jurisdiction of the District Attorney for the Birmingham Division of the Jefferson County Circuit Court. It was that official who would decide whether to prosecute Mylar or Yarber for those

crimes. Though one of his investigators was present, the District Attorney for the Birmingham Division was not consulted. Any decision later made by him, for or against prosecution, was clearly not part of any plan devised before Yarber's interrogation.

The murder and rape of Mrs. Knabe and the murder of Mr. White occurred in the Bessemer Division of the court. The Assistant District Attorney for that division was the official directly responsible for prosecuting those offenses. The testimony of Sgt. C. C. Gillespie at Yarber's suppression hearing demonstrates that the Assistant District Attorney for the Bessemer Division was not a participant in any alleged scheme on the part of law enforcement officials. After testifying that he first consulted with his superior in Jefferson County Sheriff's Department

and with the Assistant District Attorney for the Bessemer Division, Gillespie testified:

> I told Yarber that I would enter into their agreement with him that if we believed his story that I would not arrest him. But I also told him that as far as I knew, nobody in the State of Alabama but a legal body, like a grand jury or a court could give him immunity and not to expect that he was getting immunity from us from the Sheriff's office, but as - personally or as a representative from the Sheriff's office - I would not arrest him. (Emphasis Supplied)

Yarber Hearing Transcript, p. 58. That testimony is corroborated by that of Sgt. Paul Hearst of the Birmingham Police Department who testified that Gillespie had told Yarber that he would not arrest him "but couldn't say what the court would do...." Yarber Hearing Transcript, p. 50.

In order to rule for the petitioner on this claim, the court would have to find that the law officers had a thorough understanding of both state and federal

case law governing the use of prior testimony in circumstances such as those prevailing at the petitioner's trial. The amount of reported litigation in this area demonstrates that it is an area of the law not always understood by lawyers and judges. It stretches logic to assume that police officers, even experienced ones, would have understood and would have intentionally created a situation which would have permitted them to obtain Yarber's testimony against Mylar while maintaining the right to prosecute Yarber. The claim is without merit and should be dismissed.

EFFECTIVENESS OF COUNSEL

The petitioner argues that his trial counsel was constitutionally ineffective, (1) because no request was made for voir dire to attempt to show that the state wrongfully caused Yarber to renege on his promise to testify; (2) no motion to

exclude the state's evidence was made; and (3) counsel did not file an appellate brief. The circumstances giving rise to the use of Samuel Yarber's prior testimony has been adequately discussed and requires nothing further here. In Alabama, failure of the state, in a criminal case, to present a prima facie case requires the court, on motion of defendant, to exclude all the state's evidence. Randolph v. State, 100 Ala. 139, 13 So. 792 (1893). Failure of trial counsel to move to exclude the state's evidence would fall below constitutionally acceptable standards only if the motion would have been meritorious if made. The right to counsel means the right to effective counsel. It means "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective

assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), mof'd. on other grounds, 289 F.2d 928, cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In view of Yarber's testimony, it is specious for petitioner to argue that the state failed to present a prima facie case against him. The motion to exclude would have been nothing more than a futile gesture. Mylar's attorneys were not ineffective in failing to make the motion.

Mylar's claim that he was denied the effective assistance of counsel on appeal because no brief was filed cannot be disposed of so easily. The Alabama Court of Criminal Appeals is required to "consider all questions apparent on the record or reserved in the circuit court and ... enter such judgment as the law demands."[5/] Because of that statute,

---

5/Section 12-2-240, Code of Alabama 1975.

appellants in criminal cases in Alabama are not required to file briefs. Watts v. State, Ala.Cr.App., 337 So.2d 91 (1976). As noted by the respondents, it is not unusual for the Alabama appellate courts to reverse criminal convictions either on points not raised in brief or when no brief at all is filed. See Bertalsen v. State, 20 Ala.App. 539, 103 So. 480 (1925); French v. State, 28 Ala. App. 147, 180 So. 592 (1938); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Cowart v. State, 44 Ala.App. 201, 205 So.2d 250 (1967).

The petitioner's court appointed counsel on appeal filed no brief and the conviction was affirmed on the record as submitted. The Court of Appeals noted that it had "carefully searched the record for errors injuriously affective the substantial rights of appellant and have found none." Petitioner's counsel

then petitioned the Court of Criminal Appeals for rehearing arguing only the claim that the trial judge had improperly ordered Mylar to leave the witness stand during his redirect examination. After failing to get a rehearing, the attorney then petitioned the Alabama Supreme Court for a writ of certiorari on the same ground. That petition was denied.

Claims relating to the effectivess of counsel may be based upon either the due process clause of the Fourteenth Amendment or the assistance of counsel clause of the Sixth Amendment as incorporated by the due process clause of the Fourteenth. Due process is violated only if the conduct of counsel is "so grossly deficient as to render the proceedings fundamentally unfair." Kallie v. Estelle, 515 F.2d 588, 591 (5th Cir. .975). This is so "because the

system has failed, and the state's consequent imprisonment or fine of the defendant is fundamentally wrong." Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974), en banc, cert. denied, 442 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975).

The United States Supreme Court has recently abolished the distinction between retained and court appointed counsel as to the degree of protection due to the criminal defenants. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Bedfore the Supreme Court decision in Cuyler, the Fifth Circuit had enunciated different standards for retained as compared with court appointed counsel in Fitzgerald, supra. In Cuyler, Justice Powell explained:

> A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own

> lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uniformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

64 L.Ed.2d 333, at 344. Cuyler has been applied retroactively in the Fifth Circuit. See Perez v. Wainwright, 627 F.2d 762 (5th Cir. 1980).

The constitution requires that counsel take the role of active advocate in behalf of his client, as opposed to that of amicus curiae. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18

L.Ed.2d 492 (1967). He is required to "support his client's appeal to the best of his ability." The Fifth Circuit Court of Appeals has recently found conduct by retained counsel similar to that of Mylar's attorney to be obviously incompetent. In Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979), the petitioner was convicted in a Texas state court of burglary and sentenced to life imprisonment as an habitual offender. On appeal, his retained counsel, who had not represented him at trial, filed a one sentence brief which contained no more than a prayer for relief: "Appellant prays that this case be reversed and remanded for new trial." The Texas Court of Criminal Appeals examined the record "in the interest of justice" and affirmed in an unreported one paragraph per curium opinion. Referring to appellant's one sentence brief the court said, "Obviously,

this presents nothing for review." The Fifth Circuit said, "It is obvious that the representation by petitioner's retained counsel was incompetent." In the opinion of the magistrate, Mylar's claim that he was denied effective assistance of counsel on appeal is governed by Passmore, supra., which compels the decision that relief be granted. The one sentence brief filed by Passmore's attorneys was the equivalent of no brief at all. Though not required to do so, the Texas Court of Criminal Appeals examined the record for error. The Fifth Circuit held that Passmore's appellate counsel was ineffective and this court must find Mylar's counsel was ineffective. As was said in similar circumstances:

> Such review on the court's own motion is a most desirable protection against violation of fundamental rights. However, without a brief or argument the Oklahoma court's review

> was understandably narrowed. The procedure was transformed into one lacking the "active role of an advocate . . . " Entsminger v. Iowa, 386 U.S. 748, 751, 87 S.Ct. 1402, 18 L.Ed.2d 501. Whether there were particular issues which were not illumined so that the appeal was prejudiced, we cannot know since the facts were not developed.

Hill v. Page, 454 F.2d 679, 682 (10th Cir. 1971), Judge Holloway concurring and dissenting.6/

Mylar is entitled to an appeal with the active assistance of counsel and his petition should be granted on this claim.

6/ Hill is very much similar to the case presently before the court. There the rules of the appellate court in the State of Oklahoma provided that no brief was required. Under those circumstances the transcript of the trial and the other record on appeal was examined by the appeals court for "fundamental error." The attorney twice requested rehearing and supported his requests by brief. The Tenth Circuit held that such a procedure did not violate Anders, supra. This holding is, of course, in conflict with the Fifth Circuit's decision in Passmore.

CONCLUSION

In accord with the above, it is hereby recommended that the petition for habeas corpus relief be denied on all claims except the claim that the petitioner was denied the effective assistance of counsel on appeal. On that claim, it is recommended that the petition be granted and that the respondents be ordered to release the said Danny Ray Mylar from further custody resulting from his conviction for murder, unless within a reasonable time, not to exceed one hundred and eighty days (180), the State of Alabama shall afford the petitioner an out-of-time appeal with the assistance of counsel or, in the alternative, shall afford him a new trial.

Either party may file specific written objections to this report within ten (10) days of its date.

The Clerk is directed to serve a copy of this report and recommendation upon the petitioner, Danny Ray Mylar, and the Honorable Charles Graddick as Attorney General for the respondent, State of Alabama.

DONE this 6th day of March, 1981.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
MAGISTRATE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DANNY RAY MYLAR, a/k/a DANNY RAY MILES,	Filed in Clerk's Office Northern District of Alabama APR 18 1979
Petitioner,	James E.Vandegrift, Clerk United States
-vs-	
LIONEL BRAGAN, Warden, Jefferson County Jail, Birmingham, Alabama; STATE OF ALABAMA,	District Court By:/s/Dele W. Maecle (sic)
	NO. CA 78-A-0071-S
Respondents	

EXAMINATION, REPORT AND RECOMMENDATION

This is a petition for a writ of habeas corpus filed by a person in custody pursuant to a judgment of a court of the State of Alabama, 28 U.S. § 2254 (b). Danny Ray Mylar was convicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division, on an indictment charging first degree murder and was sentenced to life imprisonment. The

Alabama Court of Criminal Appeals affirmed, 343 So.2d 801 (1977) and certiorari was denied in the Alabama Supreme Court, 343 So.2d 806 (1977).[1]

On this petition, Mylar alleges, (1) he was convicted on the uncorroborated testimony of an accomplice; (2) the trial judge permitted the prosecution to use the prior testimony of petitioner's accomplice against him even though such testimony had previously been excluded from the trial of the accomplice because it was involuntarily secured; (3) no predicate was laid by the state for the use of the accomplice's testimony; (4) he was denied the right to cross-examine the accomplice; (5) the trial judge ordered

---

[1]Mylar was also convicted of common law robbery and sentenced to 18 years' imprisonment on an indictment growing out of the same incident as did his conviction. The Alabama Court of Appeals affirmed, 366 So.2d 346 (1979).

him off the stand during his own re-direct examination denying him the right to give testimony in his own behalf; (6) prejudicial comments were made by the trial judge in the presence of the jury; (7) the trial judge permitted the prosecution to question the petitioner about a list of his "sexual conquests"; (8) his attorneys were constitutionally ineffective: (a) because they did not effectively challenge the state's use of the accomplice's prior testimony; (b) because they did not make a motion to exclude the uncorroborated testimony of the accomplice; and (c) because they did not file a brief in the Alabama Court of Criminal Appeals and raised only "two minor issues" in the Alabama Supreme Court; and, (9) his attorneys have refused to provide him with a transcript of his trial. In response to several formal orders and numerous informal

requests, the State of Alabama has supplied the court with most of the records of the State Trial Court including a transcript of a preliminary hearing. These records, together with voluminous documents filed by petitioner, constitute the record before this Court.

A. EXHAUSTION OF STATE REMEDIES

The State of Alabama concedes that the issues innumerated (1) through (6) above were considered by the Alabama Court of Criminal Appeals.[2] They were presented to the trial court on a petition for a writ of error coram nobis

---

[2] It is not clear how the state arrived at this conclusion. No appellate brief was filed on Mylar's behalf and not all the habeas issues are treated in the opinion of Appeals Court. The state may have relied on the statement in that court's opinion that the court had "carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none." 343 So.2d at 806. See also § 12-22-240, Code of Alabama, 1975.

which was denied without hearing on August 4, 1977. That action was affirmed by the Court of Criminal Appeals on October 25, 1977 and certiorari was denied November 28, 1977 in unreported orders. Mylar has exhausted state remedies as to those claims. It appears that petitioner raised his claim of ineffective assistance of counsel and his claim that the trial court should not have permitted the prosecution to question him about a list of his paramours for the first time on appeal from the denial of his coram nobis petition. The claim that his attorneys have refused to provide him with a transcript of his trial is raised for the first time in this petition. If Mylar has not exhausted state remedies as to the latter three claims, then this petition would be subject to dismissal under the rule of Galtieri v. Wainwright,

582 F.2d 348 (5th Cir. 1978) which requires that state remedies be exhausted as to all claims before the United States District Court will consider a petition for a writ of habeas corpus by the state prisoner on the merits. However, a state prisoner is not required to pursue a claim through the state courts where there is no state procedure whereby he may effectively present his claim.

Generally, Alabama provides two separate and distinct means by which convicted persons may mount attacks on their criminal convictions - the writ of error coram nobis, Johnson v. Williams, 244 Ala. 391, 13 So.2d 683 (1943) and the writ of habeas corpus, Section 15-21-1, Code of Alabama, 1975. A petition for the writ of error coram nobis brings a judgment before the original trial court for correction because of an error of

fact not evident from the face of the record that would have prevented the judgement. The error of fact must have been unknown to the Court and to the convicted party at the time of trial. Smith v. Hixon, 149 F.Supp. 283 (So.Dist.Ala. 1957); Smith v. State, 245 Ala. 161, 16 So.2d 315 (1944); Groce v. State, 48 Ala.App. 709, 267 So.2d 499 (1972). The writ is not a substitute for appeal, Groce v. State, supra. Under the rule of Groce, if the Alabama Court of Criminal Appeals did not have before it Mylar's claim of error with regard to use of the list of names, then he could not have raised it later on coram nobis. Neither is the claim cognizable in the state courts on a petition for writ of habeas corpus. While the applicable statute appears to create a remedy for a broad range of complaints, the Alabama case law has severely restricted utility of the

writ. Generally, the writ issues against void judgments but not against judgments which are merely voidable. Weatherington v. City of Birmingham, 52 Ala.App. 77, 289 So.2d 645 (1973), cert.den., 292 Ala. 757, 289 So.2d 649 (1974); Hable v. State, 41 Ala.App. 398, 132 So.2d 271, cert.den., 368 U.S. 883 (1961); Flowers v. State, 4 Ala.App. 221, 59 So. 238 (1912). Habeas corpus relief will be granted only where the record shows a want or excess of jurisdiction in the trial court, State v. Thurman, 205 Ala. 677, 88 So. 899 (1921); Herrmann v. Robinson, 43 Ala.App. 422, 192 So.2d 251 (1966). Neither inadequacy of counsel, Argo v. State, 41 Ala.App. 347, 133 So.2d 201, cert.den., 272 Ala. 699, 133 So.2d 203 (1961); Brooks v. State, 41 Ala.App. 204, 133 So.2d 196, cert.den., 272 Ala. 561, 133 So.2d 198 (1961), cert.den., 360 U.S. 991 (1962) nor alleged irregular-

ities in the conduct of the trial, Ex parte Thomas, 270 Ala. 411, 118 So.2d 738, cert,den., 363 U.S. 822 (1960); Wilkie v. State, 41 Ala.App. 358, 132 So.2d 390 (1961); Hardemann v. State, 19 Ala.App. 563, 99 So. 53 (1924) will support habeas relief.

It follows from the above discussion concerning the offices of the writs of error coram nobis and of habeas corpus in Alabama that neither are available to petitioner to obtain a copy of his trial transcript from his attorneys. In the context of an attack on a criminal conviction, the magistrate is aware of no state procedure available to Mylar to obtain that transcript and the State of Alabama has pointed to absolutely none.

There remains the question of whether Mylar may pursue his claim of ineffective assistance of counsel by way of a writ of error coram nobis. The Alabama cases are far

from clear. In Ex parte Gammon, 255 Ala. 502, 52 So.2d 369 (1951) and Ex parte Argo, 41 Ala.App. 442, 137 So.2d 755, cert. dismissed, 273 Ala. 201, 137 So.2d 757 (1961), cert.den., 369 U.S. 862, 82 S.Ct. 952, 8 L.Ed.2d 20, the Alabama courts held that a claim of ineffective assistance of counsel at trial was not cognizable on coram nobis. In Peaden v. State, 272 Ala. 72, 152 So.2d 136 (1963), cert.den., 375 U.S. 854, 84 S.Ct. 114, 11 L.Ed. 80 the Alabama Supreme Court apparently considered such a claim on the merits without comment on the propriety of doing so in light of Gammon and Argo. There is no question that a claim of outright denial of counsel can be heard on coram nobis. Dillard v. State, 283 Ala. 245, 215 So.2d464 (1968), Mayola v. State, Ala.Crim.App. 337 So.2d 105, cert. den., 337 So.2d 107 (1976); Rogers v. State, Ala.Crim.App. 332 So.2d 165 cert.

den., 332 So.2d 168 (1976); Browning v. State, 57 Ala. App. 217, 326 So.2d 783 (1976). The Alabama cases have all concerned claims of ineffective assistance of counsel at trial and have been rejected on the basis that they concerned matters known to the petitioner at trial and should have been raised on appeal. It does not appear that a claim of ineffective assistance on appeal has ever been considered by the appellate courts of Alabama.

In Staten v. Alabama, 576 F.2d 654 (1978), the United States Court of Appeals for the Fifth Circuit had before it a claim similar to Mylar's, e.g., his attorney did not file an appellate brief on his behalf. Counsel in Staten was court appointed and filed a "no merit" letter indicating his opinion that Staten's direct appeal was frivolous. Mylar's attorney was retained and filed

nothing prior to the appellate decision apparently being content to rely on the court to search the record for error, §12-22-240, Code of Alabama, 1975. The Staten court reversed the granting of habeas relief to an Alabama prisoner holding without discussion and without citing any authority that he could present his claim in a state petition for coram nobis and would be required to do so in order to exhaust state remedies.

Until the decision in Staten, the magistrate entertained serious doubt that this claim could be presented in the Alabama courts. That doubt has not been fully dissipated by the rather perfunctory disposition of the question at the appellate level. However, perfunctory or not, the Fifth Circuit's decision is binding on this Court and we are not free to disregard it. Because there has been no exhaustion as to this last claim,

Galtieri, supra, mandates a dismissal without considering the exhausted claims on the merits and that will be the recommendation of the magistrate.

Ordinarily, a decision to dismiss for failure to exhaust state remedies would end the matter. In the particular circumstances of this case created by the undue and unusual delay in consideration of it, the amount of time and effort expended in its consideration and in an effort to facilitate disposition of anticipated future petitions filed by this petitioner, some discussion of the various claims may prove useful.

B. THE FACTS

The facts of this robbery, kidnapping and double murder are set out in detail in the opinion of the Alabama Court of Criminal Appeals. The court's recitation is adequately supported by the record. To some degree it is the basis for

comment in this opinion, thus it is set out in its entirety:

> The victims were Mrs. Clarice Knabe and Ronald Harvel White. Appellant was indicted for killing White with a .38 caliber pistol and one Samuel "Bud" Yarber was indicted and convicted in the shooting death of Mrs. Knabe and he, too, was sentended to life imprisonment. This is a classical case of two murder suspects, each trying to put the blame on the other and thus exculpate himself from a murder conviction. Their efforts backfired and justice still reigns supreme.
>
> This tragic episode began on the late afternoon of November 3, 1975, when Appellant went to the apartment of Yarber around 6:30 p.m. About 45 minutes later they left in Yarber's car to go out drinking. They went to several bars and drank beer at each. Appellant asked Yarber to accompany him to K-Mart's Sporting Goods Department in order to purchase some ammunition for Yarber's .38 caliber pistol which appellant had previously asked to borrow. They went to K-Mart, where appellant purchased a box of ammunition around 9:00 p.m. that night. This purchase was recorded in a book which the manager of the Sporting Goods Department testified he was required by law to keep.
>
> The two men then returned to Yarber's apartment where Yarber gave appellant his pistol. As appellant was loading the pistol the pistol discharged and

the bullet lodged in the wall or ceiling of the living room. Yarber became provoked at appellant for discharging the pistol in his apartment for fear he would be evicted. Appellant apologized to Yarber and carried the pistol out of the apartment and put it in his car.

A short while later the two men left in appellant's car and went to the 2010 Lounge in downtown Birmingham, arriving there around 9:30 p.m. They parked in the rear parking lot and entered the lounge through the back door. There were a number of customers in the place at the time. They were all drinking and watching a football game on television. The football game was over just before 11:00 p.m. and everyone left except the bartender, Mrs. Clarice Knabe, Mr. Ronald Harvel White, appellant and Mr. Yarber. At this time, according to the testimony of Mr. Yarber given at a preliminary hearing, appellant pulled out the pistol he had borrowed from Yarber and ordered Mrs. Knabe and Mr. White to put their hands up and said, "This is a stick-up." Appellant ordered Yarber to lock the front door and then demanded all the money from Mrs. Knabe and Mr. White. Mrs. Knabe protested that the owner of the lounge did not leave any money in the place. Appellant walked behind the bar to check for himself. Appellant ordered White to empty his pockets on the counter and White put his wallet on the bar. At this time there was a knock on the front door and appellant ordered Mrs. Knabe and Mr. White out

the back door and into the back seat of his car. Appellant ordered Yarber to drive the car. Yarber asked appellant where they were going and appellant told him to drive to the place where they had zeroed Yarber's deer rifle a few weeks previously. Yarber began traveling south on I-65 toward Hoover, Alabama and turned south on Highway 31. They traveled south on Highway 31 to Highway 150 going toward Bessemer. During the entire trip from the 2010 Lounge appellant kept asking Mrs. Knabe what she was going to tell the owner of the lounge and she said "We're going to tell him that two colored men came in and robbed us." Appellant asked White what he was going to say and White told him he was going to say the same thing that Mrs. Knabe was going to say.

Appellant pointed the pistol at Mrs. Knabe and White in the back seat and told them to take off all their clothes. After they had completely disrobed appellant told Mrs. Knabe to get in the front seat between him and Yarber and she did. When they arrived at the appointed place appellant ordered Mrs. Knabe out of the car and told White to keep his hands up inside the car. Appellant then proceeded to have sexual intercourse with Mrs. Knabe on the trunk of the car while Yarber and White remained inside the car. He then ordered White out of the car and told Mrs. Knabe to lie on her back on the ground. Appellant ordered White to get on top of Mrs. Knabe. While they were in that position, according to

sworn testimony given by Yarber at the preliminary hearing, appellant shot and killed both Mrs. Knabe and Mr. White. Appellant then reloaded the pistol and he emptied it again into the bodies of the two victims. Yarber saw appellant standing over the two victims with the pistol in his hand and said he did not know how many shots were fired but thought there were ten to fifteen. Appellant then got back in the car and told Yarber to return to Highway 31, and to find some deep water so that he could dispose of the gun.

As they drove along appellant directed Yarber to throw the clothes of the victims out of the car at different places and intervals along the highway. He then had Yarber drive to Lake Purdy off Highway 119 where appellant got out of the car and threw the pistol as far into the lake as he could throw it, and threw two unspent cartridges several feet out into the lake.

While in the car on the say back to town appellant pressed Yarber to take some of the money that he had obtained in the robbery of Mrs. Knabe and Mr. White. Yarber told appellant that he did not want the money but he got around fifty dollars anyway, and appellant coached Yarber as to their alibi on this fateful night.

343 So.2d 802, 803.

C. THE TESTIMONY OF SAMUEL YARBER

During the state's case in chief, Yarber was called as a witness for the state but refused to answer any question. Over objection, the trial court ruled that Yarber was an unavailable witness and permitted the prosecution to read his testimony from the transcript of Mylar's preliminary hearing. At that hearing, Mylar was represented by retained counsel who subjected Yarber to a thorough and searching cross-examination and who also represented Mylar at trial.

Petitioner's contentions with regard to this testimony will be taken in the order in which he makes them. He claims first that Yarber was an accomplice in the crime and that his testimony is uncorroborated. The pertinent Alabama statute provides:

> "A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence

> tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, it is not sufficient."

Section 12-21-222, Code of Alabama, 1975. In order for such corroborative evidence to be sufficient, it is not necessary that it be strong or that it alone be sufficient, to warrant a finding of the defendant's guilt, Peoples v. State, 56 Ala. App. 290, 321 So.2d 257 (1975); Cunningham v. State, 54 Ala.App. 656, 312 So.2d 62 (1975). It may be entirely circumstantial Hudson v. State, 49 Ala.App. 283, 270 So.2d 828 (1971); Brown v. State, 31 Ala.App. 529, 19 So.2d 88 (1944).

Mylar is apparently unaware of a line of federal cases in this circuit which permits a defendant in a federal prose-

cution to be convicted on the uncorroborated testimony of an accomplice if it is not on its face incredible or otherwise unsubstantial, U. S. v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), cert.den., 410 U.S. 908; U.S. v. Prentiss, 446 F.2d 923 (5th Cir. 1971); U.S. v. Bays, 448 F.2d 977 (5th Cir. 1971); U.S. v. Stanley, 433 F.2d 637 (5th Cir. 1970); Tillery v. U.S., 411 F.2d 644 (5th Cir. 1969). There would thus appear to be no federal constitutional impediment to the use of uncorroborated accomplice testimony to sustain a conviction. Petitioner has not pointed to any particular constitutional right which he believes was violated. Because the federal courts cannot ordinarily require a higher standard of constitutional law of state courts than they require of themselves, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), it follows that

Mylar must fall back on an alleged violation of a state procedural rule to support his claim for relief. Such an error will support habeas relief only if it effected a denial of his due process rights, Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977).

No due process rights were violated because the rule itself was not violated. Mylar testified in his own behalf and told a story essentially identical to that told by Yarber. The only significant difference was his complete reversal of the roles played by the two men. This testimony standing alone would be sufficient corroboration of Yarber. Additionally, there was testimony that Mylar purchased the ammunition used to commit the two murders. His fingerprints were found at the 2010 Lounge. At least two witnesses placed both Mylar an Yarber in the lounge on the evening of the

crimes. Bullets were found in the walls of Yarber's apartment and the lounge where Yarber testified they had been fired. Finally, the pistol used in the murders was found at the place where Yarber said it was thrown.

Next, petitioner claims that Yarber's testimony should not have been used because it had previously been suppressed in Yarber's own trial as being involuntarily given. The claim has no merit. The Fifth Amendment privilege against self-incrimination is personal to Yarber. Mylar may not object that Yarber's rights were violated, U.S. v. Dowdy, 486 F.2d 1042 (5th Cir. 1973).

The claim that no proper predicate was laid for the use of Yarber's prior testimony is likewise without merit. Again, this is a claim that the trial court violated its own state procedural rule and is subject to the holding of

Anderson v. Maggio, supra. The Alabama courts permit the use of such prior testimony if it was given: [1] under oath; [2] before a tribunal or officer having authority to take testimony and requiring an opportunity for cross-examination; [3] under circumstances affording the party against whom it is offered an opportunity to test the witnesses' credibility by cross-examination; [4] in a case where the issues and parties were substantially the same as the case in which it is offered; and, [5] where the witness is presently unavailable. Section 245.07(1), McElroy's Alabama Evidence, 3rd Ed., 1977, and cases cited therein.[3] The testimony of a witness at a preliminary hearing is admissible at a trial of the same case where the witness is not avail-

---

[3] Compare Rule 804, FRE.

able at trial, Marler v. State, 67 Ala. 55 (1880); Adkinson v. City of Andalusia, 22 Ala.App. 131, 113 So. 469 (1927). Both the trial and appellate courts found that circumstances permitted the use of Yarber's prior testimony in conformity with the Alabama rule. The magistrate has found no federal cases which would indicate that the Alabama rule is in conflict with due process requirements.

Mylar claims he was denied the right to cross-examine Yarber in violation of the Sixth Amendment Confrontation Clause as applied to the states through the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). In Pointer, the Supreme Court held that testimony at a preliminary hearing of a now unavailable witness could not be used against the defendant at trial where the defendant was without counsel at the preliminary

hearing and was thus unable to cross-examine the witness. The court added. "The case before us would be quite a different one had Phillip's [the witness] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." 380 U.S. 400, 407. In Douglas v. Alabama, 380 U.S. 415 (1965), decided the same day as Pointer, the court reversed an Alabama conviction where the prosecutor, over objection, read into the record the confession of the defendant's accomplice who refused to testify for the reason that the defendant was "denied ... the right of cross-examination secured by the Confrontation Clause." 380 U.S. 415, 419.

In California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) the defendant, Green, was charged with furn-

ishing marihuana to a minor. Much of the state's evidence came from the minor, Porter. Prior to trial Porter gave a statement to a police officer strongly implicating Green. At a preliminary hearing he testified somewhat inconsistently though still naming Green as his supplier. He was extensively cross-examined by Green's attorney, the lawyer who later represented him in the trial. At trial Porter's testimony was at best "evasive." The state was permitted to examine Porter using his testimony at the preliminary hearing. Later his statement to the officer was placed in evidence. Both were admitted as evidence of the truth of the matters contained therein. The court further held that Porter's testimony at the preliminary hearing would have been admissible at trial even had he not been present because it was given under circumstances closely

approximating a typical trial.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the court excluded the testimony of an accomplice given at a preliminary hearing because the accomplice was available as a witness for the state but was not called.

The Fifth Circuit Court of Appeals has considered the confrontation/cross-examination question on a number of occasions. The confrontation guarantee focuses upon "the right of the accused to confront and probe each of his accusers-a narrow adversary activity." U.S. v. Williams, 447 F.2d 1285, 1289 (1971) quoting The Supreme Court, 1969 Term, 84 Harv.L.Rev. 108, 112 (1970). In Hoover v. Beto, 467 F.2d 516 (1972, (en banc) cert.den. 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673, the court, in approving the use of an out of court statement by an accomplice implicating the defendant,

held that the purpose of the "Confrontation Clause is to assure that the trier of fact is provided with a satisfactory basis for evaluating the truth of the evidence presented to it, whether the evidence is hearsay or non-hearsay and whether the satisfactory basis is provided by cross-examination or otherwise," 467 F.2d 516 at 532 citing Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). In U.S. v. Ragono, 476 F.2d 410 (5th Cir. 1973), the court found that a government witness should not have been permitted to relate to the jury the testimony of a third party given before a state commission which incriminated defendant because the third party was not subject to cross-examination by the defendant at the time of the testimony and did not testify at trial.

In the present case, the testimony of Yarber was given under oath at a prelimi-

nary hearing which in Alabama closely resembles a full flown trial.[4] The petitioner was represented by the attorney who later represented him at trial of this case. His lawyer cross-examined Yarber thoroughly and almost without limitation consuming 78 pages of transcript and approximately one and one-half hours. The entire testimony of Yarber took all of one afternoon and was concluded the following morning. It can hardly be said that the circumstances did not provide the trier of fact with a satisfactory basis for evaluating the truth of the evidence presented to it. Green v. California, supra.

D. CONDUCT OF THE TRIAL JUDGE

Mylar claims that he was prejudiced when the trial judge characterized as

---

[4] See generally, Title 15, Chapter 11, Code of Alabama, 1975.

"foolishness" some of his attorney's cross-examination of Yarber. After the court reporter had completed his reading of Yarber's testimony defense counsel objected as follows:

> "[I] objected to the last three or four pages of re-direct examination on the grounds it was cumulative. The court said that there had been a lot of foolishness in the transcript with questions that I had asked on cross-examination too and that the jury had a right to hear all of it...."

TR. 230.

The record does indicate some irritation on the part of the trial judge with defense counsel at this and other times during the course of the trial. It does not disclose a degree of intervention or hostility which could have led the jury to a predisposition of guilty by confusing the functions of judge and prosecutor. U.S. v. Abrams, 568 F.2d 411 (5th Cir. 1978). U.S. v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977); U.S. v.

Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975).

Petitioner complains that the court unduly restricted his right to give testimony in his own behalf when it ordered him to leave the witness stand and return to his chair.[5] A trial judge is not required to remain silent and passive throughout a jury trial. He has a duty to facilitate the orderly progress of the trial and to clear the path of petty obstructions. It is his duty to discourage dilatory tactics of counsel. Adler v. U.S., 182 F. 464 (5th Cir. 1910). Clearly Mylar was given a full and complete opportunity to give his testimony and was in no way restricted.

---

[5] Mylar's testimony covered 113 pages of a 410-page transcript. The incident complained of occurred after he had testified on direct and cross and had been examined on re-direct two times before. See TR. 392-93.

E. THE LIST OF "SEXUAL CONQUESTS"

During the course of his cross-examination of petitioner, the prosecutor undertook to inquire into a list of names, apparently compiled by petitioner, which the prosecutor characterized as a list of women with whom Mylar had had sexual relations. Over objection the court allowed the questions and the list itself was admitted into evidence.[6]

---

[6] The portion of the transcript regarding this episode is set out in its entirety:

Q. Mr. Yarber and Mrs. Knabe got out of the car?

A. Yes, sir.

Q. Mr. Yarber have sexual relations with Mrs. Knabe?

A. Not to my knowledge; no, sir.

Q. Did he ever leave your sight?

A. They were to the rear of the car.

Q. Did you see them?

A. At times.

(continued f_n. 6)

Q. Was there any period of time when you could not see them?

A. No, not longer than a few minutes at a time.?

Q. Did you ever discover Mr. Yarber had taken off any of his clothes?

A. No,sir.

Q. Mr. Yarber directed Mrs. Knabe to lay on the ground?

A. Yes, sir.

Q. And told Mr. White to lay beside her?

A. He just said, "over there with her."

Q. Did he ever say, "lay down?"

A. Yes, sir.

Q. Did he ever make any direction or tell Mr. Yarber to have relations with her. I mean, excuse me, Mr. White have relations with her. Any conversation along those lines?

A. I don't know. Not that I recall.

Q. You had known Bud Yarber pretty well, hadn't you?

A. No, I mean other than the, around the Summit House apartment.

(continued fn. 6)

Q. Were you aware of whether or not he had any unusual or perverse attitudes or sexual hang-ups or habits or quirks?

A. I do not know how to answer that?

Q. Were you aware of it?

A. Not other than the fact that he collected pornographic magazines.

Q. Did he keep a list of women that he had relations with?

A. Not to my knowledge.

Q. Did you keep a list?

A. No, sir.

Q. Do you know Gale Russo from Youngstown, Ohio?

A. Yes, sir.

Q. Do you know Ava from Birmingham?

A. Yes, sir.

Q. Show you this--

MR. WILKINSON: I've seen the list, I object to it because it's irrelevant, immaterial and prejudicial perhaps; we object to it.

THE COURT: Overruled.

MR. WILKINSON: We except.

(continued fn. 6)

Q. (By Mr. Reynolds) Tell me what this is, please.

A. Tell you what it is?

Q. Yes, sir.

A. It's a list of people that I know?

Q. Just people that you know?

A. Yes, basically people that I have been interested in in one way, one form or another, I guess, over the years.

Q. Well, what does the initial "W" stand for on some of these things?

A. I don't know, I don't really remember that. When I was--Port au Prince, Haiti; that was nine years.

Q. You didn't make the list nine years ago, did you?

A. I have kept a list of people that I have known for probably longer than that other than that.

Q. And this list a compilation of other lists?

A. Sir?

Q. Is this list, did you compile this list from other lists--

MR. WILKINSON: Excuse me. Before you answer that we want to object to the whole line of inquiry.

(continued fn. 6)

THE COURT: Overruled.

MR. WILKINSON: On the grounds it's prejudicial.

THE COURT: The Court Reporter will write down your objection to every question asked about this and I will overrule your objection in advance, grant you exception to it.

Q. (By Mr. Reynolds) This list includes Mugsies wife in Youngstown, Ohio.

A. Yes, sir.

Q. Isn't it a fact, Mr. Miles, that this is a list of women that you have had sexual relations with? Did you keep a list of them?

A. No, sir.

Q. The initial "W" on here indicates "whore" or "prostitue?"

A. No, sir. I don't really recall.

Q. Well, you recall that Ava is number ninety-five on this list. Is that right?

A. I do not know.

Q. How many names are on the list after Ava's name is on the list?

A. Twenty-some names.

Q. This is your writing, isn't it?

(continued fn. 6)

A. Yes, sir.

Q. Would you read what it says by number forty there?

A. With craps.

Q. C-R-A-P-S. Runs down into another line, something with craps, behind playhouse, Youngstown, Ohio.

A. Youngstown, Ohio--I don't know.

Q. That was what you found interesting about that person?

A. I don't recall. There's a lot of people on that list.

Q. Number sixty-three was Nicky and Carter, Youngstown, Ohio, the interesting part about that?

A. You want me to break it down?

A. I want you to answer my question.

MR. WILKINSON: We object to the question again because it's assuming something that's not in evidence that "interesting part of the list," it's ambiguous.

THE COURT: Overruled.

Q. (By Mr. Reynolds) Number sixty-four W, took money back, Youngstown, Ohio. Sixty-five W, took purse, Youngstown, Ohio. Sixty-six W, front of diner, Youngstown, Ohio. Do you recall any of those names and what

Other than the reversal of the roles played by them, the only significant difference between the testimony of

---

(continued fn. 6)

> that might mean to you as far as keeping a list of interesting people?
>
> A. It would just be a, how I've come to know them or something they've done, something amusing, something, I don't--that's all that list--and various lists that I have are for.
>
> A. There are not any men on this list, are there?
>
> A. I don't know if there are any on the list or not.
>
> Q. Would you look at it, see if you can find anything but ladies' names on that list?
>
> A. Joe. Micky.
>
> Q. What does it say about Micky?
>
> A. Abel's Cantina. Right in the cantina. That was a guy that came in. Jerry.
>
> Q. What's the wording after Jerry's name?
>
> A. San Francisco. That was a guy I used to work for in San Francisco. I don't know what all those are for.

Danny Ray Mylar and the testimony of Samuel Yarber was this: Yarber testified that while at the scene of the murders, Mylar took Mrs. Knabe to back of the car where he had sexual relations. Mylar's testimony did not include this incident.[7] It appears that by pursuing this line of questions, the prosecutor was seeking to show that Mylar was the kind of person who would have had sexual relations with his victim just before killing her thus supporting the testimony of Yarber while at the same time tending to discredit the testimony of Mylar. In other words, the prosecutor sought to show a bad character trait to imply that Mylar acted in conformity therewith. Mylar complains that the trial judge erred in permitting this

---

[7] The autopsy on the body of Mrs. Knabe tended to confirm that she had engaged in sexual intercourse shortly before her death.

line of inquiry. He may very well be correct. See Section 140.01(10), McElroy's Alabama Evidence, 3rd Ed., 1977 and cases cited therein. The admissibility, vel non, of this evidence under state law does not determine the federal constitutional question. Brent v. White, 398 F.2d 503 (5th Cir. 1968), cert.den., 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130 (1969). Ordinarily federal courts do not "sit to review state court actions on questions of the propriety of the trial judge's action in the admission of evidence." Lisenba v. California, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.ed. 166 (1941); Burgett v. Texas, 389 U.S. 109, 99 S.Ct. 258, 19 L.Ed. 2d 319 (1967); Nees v. Culbertson, 406 F.2d 621 (5th Cir. 1969); Williams v. Wainwright, 427 F.2d 921 (5th Cir. 1970), vacated as to death penalty, 408 U.S. 941; Pleas v. Wainwright, 441 F.2d 56

(5th Cir. 1971); Mercado v. Massey, 536 F.2d 107 (5th Cir. 1976). However, federal habeas relief will lie to determine whether an error in applying a state evidentiary rule was of such a magnitude as to deny fundamental fairness in violation of the Due Process Clause. Hills v. Henderson, 529 F.2d 397 (5th Cir. 1976); Barnard v. Henderson, 514 F. 2d 744 (5th Cir. 1975); Heads v. Beto, 468 F.2d 240 (5th Cir. 1972), cert.den., 410 U.S. 969, 93 S.Ct. 1454, 35 L.Ed.2d 704 (1973). The erroneous admission of evidence will justify habeas relief only if it is "material in the sense of a crucial, critical, highly significant factor. Corpus v. Beto, 469 F.2d 953 (5th Cir. 1972), cert.den., 414 U.S. 932, 94 S.Ct. 236, 38 L.Ed.2d 162 (1973).

Use of the evidence of Mylar's list of names simply was not crucial to the decision in the trial. Both Mylar and

Yarber told essentially the same story with each potraying himself as an innocent victim and the other as the perpetrator of the crimes. It is too simple to view the jury's task as a mere credibility choice between the two of them. Were that the case the effort by the state prosecutor to paint Mylar as sexually promiscuous would be more serious. Both told stories which were somewhat incredulous. It is more probable that the jury, instead of believing one and disbelieving the other, simply disbelieve the protestations of innocence from both men. Neither of the two men showed any particular traits of good character sufficient to recommend them to a jury. Rather, they appeared as two criminals, equally guilty, each trying to shift his guilt to the other. It would have been an aberration had the jury found either worthy of belief. When

viewed in this light, this mild attack on the character of the petitioner pales into insignificance.

F. THE TRANSCRIPT

The claim that Mylar's attorneys refused to give him his trial transcript does not present a constitutional claim.

G. EFFECTIVENESS OF COUNSEL

The petitioner's claims that his attorneys were ineffective because they were unusccessful in preventing the use of Yarber's prior testimony and did not move to exclude such testimony do not present constitutional questions. As set out above, the use of such testimony was permissible and counsel cannot be faulted for failing to successfully advance an incorrect position. The claim that they failed to file an appellate brief is somewhat more troublesome.

The record shows that no brief was filed in the Alabama Court of Criminal

Appeals. [Letter to petitioner from the Clerk of that court dated April 8, 1977] A motion for rehearing accompanied by brief of counsel was filed on February 15, 1977 and denied without opinoin on March 1, 1977. Thereafter a petition for certiorari with brief was filed by Mylar's attorneys. It was also denied.

As noted in Section A. above, this claim has not been properly presented to the state courts. Mylar may present the claim on a petition for a writ of coram nobis, Staten v. Alabama, supra. Because the claim has not been considered by any Alabama Court, it would be inappropriate to comment on it here, except to reiterate that it is the failure to exhaust this claim which prevents a decision on the merits here. Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978).

H. CONCLUSION

It is recommended that the petition

for a writ of habeas corpus be dismissed for failure to exhaust state remedies on the claim of ineffective assistance of counsel on appeal.

This recommendation is governed by Rule 2(c) of the Rules Governing Jurisdiction and Authority of United States Magistrates in this Court which provides that either party may file specific objections to the magistrate's report in writing within ten (10) days of its date.

The Clerk is directed to furnish the petitioner and the defendant through its attorney of record with a copy of this report and recommendation and the Court's proposed judgment.

DATED, this 8th day of April, 1979.

s/s Edwin L. Nelson
EDWIN L. NELSON
United States
Magistrate

* * * * *

APPENDIX B

Danny Ray MYLAR, a/k/a Danny Ray Miles, Plaintiff-Appellant,

v.

STATE of ALABAMA, Defendant-Appellee.

No. 81-7412.

United States Court of Appeals, Eleventh Circuit.

April 1, 1982.

The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., denied habeas corpus application by State prisoner, and petitioner appealed. The Court of Appeals, Johnson, Circuit Judge, held that counsel's failure to file brief with appeal constituted ineffective assistance of counsel, even though State rule permitted filing of appeal without filing brief and required appellate court to review record for error apparent on the record.

Reversed and remanded with instructions.

1. Criminal Law 641.13(1)

To establish ineffective assistance of counsel, defendant must show that his attorney failed to provide reasonably effective representation. U.S.C.A.Const. Amend. 6.

2. Criminal Law 641.13(1)

Reasonably effective respresentation by counsel does not entitle defendant to error free performance but does require that counsel's conduct fall within range of competency generally demanded of attorneys in criminal cases. U.S.C.A. Const.Amend. 6.

3. Criminal Law 641.13(7)

Counsel's failure to file a brief with appeal constituted ineffective assistance of counsel, even though State rule permitted filing of appeal without filing brief and required appellate court to review record for error apparent on the record. Ala.Code 1975, § 12-22-240; Ala.Rules App.Proc., Rules 39(f), 40; U.S.C.A.Const.Amend. 6.

4. Criminal Law 641.13(7)

As an active advocate, appellate counsel is duty bound to affirmatively promote his client's position before court and such duty not only requires counsel to inform court of errors committed at trial, but additionally mandates that counsel provide legal citations and reasoning to support any claim for relief. U.S.C.A.Const. Amend. 6.

5. Criminal Law 1130(1)

Mere fact that appellate courts are obligated to review record for errors cannot be considered substitute for legal reasoning and authority typically found in brief. Ala. Code 1975, § 12-22-240;

Ala. Rules App. Proc. Rules 39(f), 40; U.S.C.A.Const.Amend. 6.

6. Criminal Law 641.13(7)

Failure to file brief in nonfrivolous appeal falls below standard of competency expected and required of counsel in criminal cases and constitutes ineffective assistance. Ala.Code 1975, § 12-22-240; Ala.Rules App.Proc., Rules 39(f), 40; U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Northern District of Alabama.

Before MORGAN, JOHNSON and HENDERSON, Circuit Judges.

JOHNSON, Circuit Judge:

We are again called upon to determine whether a criminal defendant received effective assistance from his attorney. Concluding that counsel's failure to file a brief with the direct appeal in state court amounted to ineffective assistance in contravention of the Sixth Amendment, we reverse and remand with instructions.

Appellant Danny Ray Mylar was convicted of first degree murder and sentenced to life imprisonment. The facts surrounding his sordid crime are adequately set forth in the appellate court's opinion and need not be repeated here. Miles v. State, 343 So.2d 801 (Ala.Crim.App.), cert. denied, 343 So.2d 806 (Ala.1977). Following the trial, Mylar sought appellate review of the con-

viction. His attorney, however, failed to file a brief with the appeal. Under Alabama law, counsel need not file a brief in order to perfect the appeal.[1] The Alabama Court of Criminal Appeals reviewed the record for error as required by statute and affirmed the conviction.[2] Mylar unsuccessfully petitioned for rehearing and a writ of certiorari. In

---

1. Ala.Code § 12-22-240 requires the Alabama Court of Criminal Appeals to examine the record in every appeal for errors "apparent on the record." Alabama courts have long held that the requirement of mandatory review alleviates the need for an attorney to file a brief with the appeal. Hymes v. State, 209 Ala. 91. 95 So.2d 983 (1923); Youngblood v. City of Birmingham, 338 So.2d 526 (Ala. Crim.App. 1976); see also Kenny v. State, 51 Ala.App. 35, 282 So.2d 387, cert. denied, 291 Ala. 786,282 So.2d 392 (1973) referring to Ala.Code § 12-22-240 as a "lazy lawyer" statute).

2. Ala.Code § 12-22-240 states:

> In all cases appealable to the court of crinminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands.

both instances, his attorney filed briefs.[3]

After exhausting state remedies, Mylar sought habeas relief in federal district court. He raised a plethora of issues, including ineffective assistance of counsel. A federal magistrate meticulously reviewed the many issues and determined that most were without merit. He did conclude, however, that the failure of Mylar's attorney to file a brief with the direct appeal amounted to ineffective assistance of counsel and recommended that habeas relief be granted. The district court adopted the majority of the magistrate's report but rejected the determination that Mylar had received ineffective assistance. The lower court concluded that any harm caused by the failure to file a brief had been eliminated by the state court's examination of the record for "apparent" errors. Upon this review, we reach only the claim of ineffective assistance of counsel.

[1,2] To establish ineffective assistance, a defendant must show that his attorney failed to provide "reason-

---

3. Although a brief need not be filed to perfect a direct appeal, Alabama does require that a brief be submitted with a petition for rehearing. A.R.A.P. 40; Hobbie v. State, 365 So.2d 685 (Ala.Crim.App. 1978). Similarly, the Alabama Supreme Court will not consider a petition for certiorari absent a brief. A.R.A.P. 39(f); Evans v. State, 268 Ala. 344, 105 So.2d 834 (1958).

ably effective representation." United States v. Phillips, 664 F.2d 971, 1040 (5th Cir. 1981). Reasonably effective representaiton does not entitle a defendant to an error free performance. Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir. 1981). It does, however, require that counsel's conduct fall within the range of competency generally demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); accord. Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981).

[3] Few cases have elucidated the "range of competency" required of counsel on appeal. Courts have generally held that the inexcusable failure of counsel to perfect an appeal constitutes ineffective assistance. E.g., Chapman v. United States, 469 F.2d 634 (5th Cir. 1972)(after filing notice of appeal, counsel intentionally abandoned appeal without notifying defendant); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966) (attorney intentionally failed to file appeal without notifying defendant). On the other hand, an attorney's failure to brief meritless points of law will normally not be deemed ineffective asistance. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981); accord, Gustave v. United States, 627 F.2d 901 (9th Cir. 1980). The instant case, however, falls between the two extremes. Mylar received an appeal, but was denied the benefit of any adversarial brief, including argument in favor of his position. Although a troublesome issue, we glean sufficient guidance from prior decisions to conclude that the failure of this instance to file a brief with the appeal constituted

ineffective assistance of counsel.

[4] In Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), the Supreme Court made clear that appellate counsel must function as an "active advocate on behalf of his clients." Accord, Entsminger v. Iowa, 386 U.S. 748, 751, 87 S.Ct. 1402, 1403, 18 L.Ed.2d 501 (1967). As an "active advocate", appellate counsel is duty bound to affirmatively promote his client's position before the court. Such a duty not only requires counsel to inform the court of errors committed at trial, but additionally mandates that counsel provide legal citations and reasoning to support any claim for relief. Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case. See Anders, supra, 386 U.S. at 745, 87 S.Ct. at 1400 (a brief would "induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as funished by counsel.")

Whether the failure to file an appellate brief constitutes ineffective assistance of counsel was squarely confronted in Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979), cert. denied, 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 789 (1980). The court opined that the failure of defendant's counsel to file a brief with the direct appeal could "hardly be said to reflect the 'role of an active advocate in behalf of his clients.'" Id. at 663 n.4. Although acknowledging that the state court had

reviewed the record for "fundamental error", the court nonetheless concluded that the failure to file a brief fell below the minimum level of competency required by the Constitution. See also Robinson v. Wyrick, 635 F.2d 757, 759 (8th Cir. 1981)(filing brief that presented no errors for review constituted ineffective assistance of counsel).

The State contends that neither the holding in Passmore nor the reasoning in Anders controls the instant case. The State correctly points out that under Alabama law the Court of Criminal Appeals must examine the record in every appeal for errors "apparent on the record or reserved in the circuit court...." Ala.Code § 12-22-240. The State argues and the district court found that this statutory duty guarantees that all criminal defendants will receive a meaningful review and therefore eliminates any harm caused by the absence of an appellate brief. We find the argument unpersuasive.

[5] Admittedly, in Passmore, the state appellate court was not compelled by state law to examine the record for error. Nonetheless, the court did so. We consider it somewhat specious to suggest that Mylar received a more meaningful review than the defendant in Passmore simply because the Alabama appellate courts are compelled by law to examine the record. Moreover, if a brief contained nothing more than a list of errors, Alabama's requirement of mandatory review might well alleviate the need for an appellate brief. As previously noted, however, a brief normally contains more than a list of errors. A brief sets

forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically found in a brief.[4]

---

4. The State relies primarily upon Hill v. Page, 454 F.2d 679 (10th Cir. 1971), to support its position. In Hill, a divided panel concluded that the absence of an appellate brief did not constitute ineffective assistance of counsel where the appellate court reviewed the record for "fundamental error." The majority opinion is conclusory and contains no insightful analysis. We find the position articulated by the dissent more convincing. Id. at 681, 682 (Holloway, J., dissenting)(stating that failure to file appellate brief is inconsistent with counsel's duty as an "active advocate").

Further, in deciding this case, we do not write on a clean slate. In Passmore v. Estelle, supra, the former Fifth Circuit determined that the absence of a brief amounted to ineffective assistance, notwithstanding the fact that the state appellate court had actually reviewed the record for error. We find Passmore indistinguishable from the instant case in all material aspects. Having adopted the former Fifth Circuit case law as precedent, Bonner v. City of Prichard, 661 F.2d 12-6 (11th Cir. 1981)(en banc), we are not free to overrule Passmore and adopt the majority's "reasoning in Hill v. Page, supra, even if we found it persuasive.

The State further asserts that the failure to file the brief with the district court was cured when Mylar's attorney filed a brief with the petition for rehearing and certiorari. We do not agree. An appellate court conducts its most in-depth and complete review of a case during the direct appeal. A petition for rehearing typically receives a more summary consideration. Similarly, a brief filed with a petition for certiorari cannot compensate for the absence of an appellate brief. A state supreme court does not normally accept certiorari in all cases. As a result, most defendants petitioning for certiorari will not receive the same type of plenary review that occurs during the direct appeal. Accordingly, the duties of an "active advocate" mandate that appellate counsel assert his client's position at the most opportune time by filing a brief with the direct appeal.

[6] We hold that the failure to file a brief in a nonfrivolous appeal falls below the standard of compentency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance.[5] We do not at

5. Independent of the constitutional issue, we question the wisdom and propriety of an attorney failing to submit an appellate brief in a capital case. Although Alabama courts have long held that counsel need not file a brief to perfect an appeal, see note 1 supra, the stakes in Mylar's case--life imprisonment--dictated that his attorney not rely exclusively upon review of the record by the appellate court to obtain reversal or a new trial. Instead, counsel should have actively advocated his client's position by filing a brief with the direct appeal.

this time set aside the conviction in this case. However, we do remand the case to the district court with instructions to grant the petition for habeas corpus unless the State of Alabama within a reasonable time grants Mylar either an out-of-time appeal or a new trial. Passmore v. Estelle, supra, 607 F.2d at 664; Hall v. Wainwright, 441 F.2d 391, 393 (5th Cir. 1971).

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-7412

D. C. Docket No. CA-79-A-1420-S

DANNY RAY MYLAR,
a/k/a DANNY RAY MILES,

Plaintiff-Appellant,

versus

STATE OF ALABAMA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

Before MORGAN, JOHNSON and HENDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby reversed and remanded to the said District Court with instructions in accordance with the opinion of this Court.

April 01, 1982

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7412

U.S.Court of Appeals
Eleventh Circuit
FILED
APR 29 1982
NORMAN E. ZOLLER
Clerk

DANNY RAY MYLAR a/k/a
DANNY RAY MILES,

Plaintiff-Appellant,

versus

STATE OF ALABAMA,

Defendant-Appellee.

- - - - - - - - - - -

An appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 1, 11 Cir., 1982, ___ F.2d ___).

(April 29, 1982)

Before MORGAN JOHNSON and HENDERSON,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

May 13, 1982

Norman E. Zoller
Clerk

Tel. 404-221-6187
FTS 242-6187
56 Forsyth St. N.W.
Atlanta,Georgia 30303

Mr. Joseph G.L.Marston, III
Assistant Attorney General
250 Administrative Bldg.
Montgomery, AL 36104

No. 81-7412
MYLAR -vs- STATE OF ALABAMA
CA-79-A-1420-S

MANDATE STAYED TO AND
INCLUDING June 12, 1982

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter

of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are coies of the said documents which have been entered in this cause.

Very truly yours,

NORMAN E. ZOLLER, Clerk

By: /s/Phyllis R.Scott
Deputy Clerk

Encls.

cc: Ms. Linda B. Friedman

APPENDIX C

28 UNITED STATES CODE 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective pro-

cess or the existence of circumstances rendering such process ineffective to protect the right of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In an proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indi-

cia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to prepresent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State Court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the ckerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX D

343 So.2d 801

Danny Ray MILES, alias

v.

STATE.

6 Div. 222.

Court of Criminal Appeals of Alabama.

Feb. 1, 1977.

Rehearing Denied March 1, 1977.

Defendant was convicted in the Circuit Court, Jefferson County, Henry E. Pickens, J., of murder in the first degree and he appealed. The Court of Criminal Appeals, Harris, J., held that where defendant's co-felon refused to testify at defendant's trial, the trial court properly admitted into evidence the co-felon's testimony given at defendant's preliminary hearing, at which time co-felon had been subjected to an extensive, thorough and searching cross-examination by defendant's lawyers; and that where defendant and his cofelon were engaged in a common enterprise, both could be convicted of murder, regardless of which of them actually pumped the bullets into the bodies of the victims.

Affirmed.

Certiorari denied, Ala., 343 So.2d 806.

1. Criminal Law 544

In prosecution for murder in first degree in which defendant's cofelon refused to testify, trial court did not err in admitting into evidence cofelon's testimony given at defendant's preliminary hearing, at which time cofelon had been subjected to extensive, thorough and searching cross-examination by defendant's lawyers.

2. Criminal Law 1159.4(2)

It was solely within province of jury and not Court of Criminal Appeals to determine credibility of cofelons who sought to blame each other for crime.

3. Homicide 29

Where defendant and cofelon were engaged in common enterprise when two victims were killed, both could be convicted of murder in first degree, regardless of which of them actually pumped the bullets into the bodies.

No brief for appellant.

William J. Baxley, Atty. Gen. and Eugenia D. B. Hofammann, Ast. Atty. Gen., for the State, appellee.

HARRIS, Judge.

Appellant, Danny Ray Miles, AKA Danny Ray Mylar, was convicted of murder in the first degree and the jury fixed his punishment at life imprisonment in the penitentiary. Throughout the trial proceedings appellant was represented by

the widely known law firm of Wilkinson, Purvis, Pickard & Parsons of Birmingham. All of these lawyers are experienced in trial work and are noted for their resourcefulness, ingenuity and astuteness in protecting the constitutional rights of their clients.

This is one of the most bizarre cases to find its way to this Court in a long time. It involves a double murder, robbery, kidnapping and rape. The victims were Mrs. Clarice Knabe and Ronald Harvel White. Appellant was indicted for killing White with a .38 caliber pistol and one Samuel "Bud" Yarber was indicted and convicted in the shooting death of Mrs. Knabe and he, too, was sentenced to life imprisonment. This is a classical case of two murder suspects, each trying to put the blame on the other and thus exculpate himself from a murder conviction. Their efforts backfired and justice still reigns supreme.

This tragic episode began on the late afternoon of November 3, 1975, when appellant went to the apartment of Yarber around 6:30 p.m. About 45 minutes later they left in Yarber's car to go out drinking. They went to several bars and drank beer at each. Appellant asked Yarber to accompany him to K-Mart's Sporting Goods Department in order to purchase some ammunition for Yarber's .38 caliber pistol which appellant had previously asked to borrow. They went to K-Mart, where appellant purchased a box of ammunition around 9:00 p.m. that night. This purchase was recorded in a book which the manager of the Sporting Goods Department testified he was required by law to keep.

The two men then returned to Yarber's apartment where Yarber gave appellant his pistol. As appellant was loading the pistol the pistol discharged and the bullet lodged in the wall or ceiling of the living room. Yarber became provoked at appellant for discharging the pistol in his apartment for fear he would be evicted. Appellant apologized to Yarber and carried the pistol out of the apartment and put it in his car.

A short while later the two men left in appellant's car and went to the 2010 Lounge in downtown Birmingham, arriving there around 9:30 p.m. They parked in the rear parking lot and entered the lounge through the back door. There were a number of customers in the place at the time. They were all drinking and watching a football game on television. The football game was over just before 11:00 p.m. and everyone left except the bartender, Mrs. Clarice Knabe, Mr. Ronald Harvel White, appellant and Mr. Yarber. At this time, according to the testimony of Mr. Yarber given at a preliminary hearing, appellant pulled out the pistol he had borrowed from Y arber and ordered Mrs. Knabe and Mr. White to put their hands up and said, "This is a stick-up." Appellant ordered Yarber to lock the front door and then demanded all the money from Mrs. Knabe and Mr. White. Mrs. Knabe protested that the owner of the lounge did not leave any money in the place. Appellant walked behind the bar to check for himself. Appellant ordered White to empty his pockets on the counter and White put his wallet on the bar. At this time there was a knock on the front door and appellant ordered Mrs. Knabe and

Mr. White out the back door and into the back seat of his car. Appellant ordered Yarber to drive the car. Yarber asked appellant where they were going and appellant told him to drive to the place where they had zeroed Yarber's deer rifle a few weeks previously. Yarber began traveling south on I-65 toward Hoover, Alabama, and turned south on Highway 31. They traveled south on Highway 31 to Highway 150 going toward Bessemer. During the entire trip from the 2010 Lounge appellant kept asking Mrs. Knabe what she was going to tell the owner of the lounge and she said, "We're going to tell him that two colored men came in and robbed us." Appellant asked White what he was going to say and White told him he was going to say the same thing that Mrs. Knabe was going to say.

Appellant pointed the pistol at Mrs. Knabe and White in the back seat and told them to take off all their clothes. After they had completely disrobed appellant told Mrs. Knabe to get in the front seat between him and Yarber and she did. When they arrived at the appointed place appellant ordered Mrs. Knabe out of the car and told White to keep his hands up inside the car. Appellant then proceeded to have sexual intercourse with Mrs. Knabe on the trunk of the car while Yarber and White remained inside the car. He then ordered White out of the car and told Mrs. Knabe to lie on her back on the ground. Appellant ordered White to get on top of Mrs. Knabe. While they were in that position, according to sworn testimony given by Yarber at the preliminary hearing, appellant shot and killed both Mrs. Knabe and Mr. White. Appellant then reloaded the pistol, and he emptied it

again into the bodies of the two victims. Yarber saw appellant standing over the two victims with the pistol in his hand and said he did not know how many shots were fired but thought there were ten to fifteen. Appellant then got back in the car and told Yarber to return to Highway 31, and to find some deep water so that he could dispose of the gun.

As they drove along appellant directed Yarber to throw the clothes of the victims out of the car at different places and intervals along the highway. He then had Yarber drive to Lake Purdy off Highway 119 where appellant got out of the car and threw the pistol as far into the lake as he could throw it, and threw two unspent cartridges several feet out into the lake.

While in the car on the way back to town appellant pressed Yarber to take some of the money that he had obtained in the robbery of Mrs. Knabe and Mr. White. Yarber told appellant that he did not want the money but he got around fifty dollars anyway, and appellant coached Yarber as to their alibi on this fateful night.

Yarber was called as a State witness during appellant's murder trial but he refused to answer a single question posed to him by the trial court or the District Attorney. Yarber would not even state his name. The trial court ruled that it would serve no useful purpose to hold him in contempt of court and sentence him to jail. The trial court, over appellant's objection, admitted into evidence Yarber's testimony given at appellant's preliminary hearing at which time Yarber

was subjected to an extensive, vigorous, withering, thorough and searching cross-examination by appellant's lawyers.

It is noteworthy that appellant testified at his own trial and his testimony as to all the details, places, and circumstances leading up to and culminating in the robbery, kidnapping and killing of Mrs. Knabe and Mr. White, in the main, pigtracked the testimony of Yarber with one exception: Appellant claimed that Yarber was the leading actor in the entire drama and it was Yarber who did all the things that Yarber accused appellant of doing.

[1] Appellant objected to the introduction of Yarber's testimony given at the preliminary hearing on the ground that the proper predicate had not been laid for his former testimony, viz., (1) that the witness was not absent from the State permanently, (2) that he was not dead, (3) that he could not be found after diligent effort, (4) that he was not under any disability, and (5) that he was not available by reason of a claim of privilege. These were the common-law rules governing the admissibility of a witness's testimony, given under oath, at a former trial, or preliminary hearing, when the witness was cross-examined or the opportunity was afforded for cross-examination.

These rigid common-law rules have been relaxed in many states in the interest of insuring a full measure of justice. These rules have been relaxed in this state for this reason and it is now settled law. Wyatt v. State, 35 Ala.App. 147, 46 So.2d 837; Bridges v.

State, 26 Ala. App. 1, 152 So. 51.

In Bridges v. State, supra, this Court said:

> "The witness Gilpin, when called, refused to testify, claiming his constitutional right not to be forced to give evidence which would tend to incriminate him. He thereby placed himself where he was not available to the state to be used as a witness. Thereupon, over the objection and exception of defendant, the state was allowed to make preliminary proof that this witness had been examined and cross-examined as a witness for the state on the former trial of this same case in the circuit court of Jefferson county, and over objection and exception of defendant the state was then allowed to read to the jury the testimony of the witness Gilpin given on such former trial. This is not now an open question in this state, and while there are some decisions to the contrary, this court and the Supreme Court have spoken on the question and we see no reason to reopen the subject. The witness Gilpin having testified on a former trial of this case, with full opportunity for cross-examination and when called to testify on this trial he rendered himself incompetent as a witness without fault on the part of the state, the trial court properly allowed his testimony on the former trial to be read in evidence. Woodward v. State, 21 Ala.App. 417, 109 So. 119; McCoy v. State, 221 Ala. 466, 129 So. 21."

Oliver Clark was driving on Highway 150 around 7:00 a.m. on November 4, 1975 and discovered the nude bodies of the victims. He went to a telephone and called the office of the State Troopers. State Trooper Jim Wallace responded to the call. After viewing the bodies Trooper Wallace secured the scene and notified all State, County and City law enforcement agencies.

J.F. Helton, Deputy Corner of Jefferson County, came to the murder scene and pronounced the victims dead.

Jay Glass, and Assistant Pathologist, with years of experience in performing autopsies to determine the cause of death, came to the murder scene and performed autopsies on both victims. He stated that the cause of death of both the male and female was due to multiple gunshot wounds. The bodies were removed to a local morgue where more definitive autopsies were performed. He took a vaginal smear and by a microscopic examination determined evidence of spermatazoid. Mr. Glass also found numerous penetrating and perforating gunshot wounds to the head and body of both victims and he was able to remove several projectiles or slugs from each body. He further testified there were seven entrance wounds in the body of the female and nine entrance wounds in the body of the male.

Some sixteen witnesses testified for the State and we see no reason to detail the testimony given by each of them. Mrs. Alma Vest was the last person to see appellant, Yarber, Mrs. Knabe and Mr. White together at the 2010 Club on

November 3, 1975, just before 11:00 p.m. She knew Mr. White as he was her immediate supervisor at the Post Office where both of them were employed. At the time she left the 2010 Club with her companion no one was at the club except Mrs. Knabe, Mr. White, appellant and Yarber.

After these brutal killings were discovered the law enforcement officials in Jefferson County began an extensive manhunt to track down and apprehend the killers. Evidence technicians found fingerprints on glasses and beer bottles and Mrs. Knabe's purse on the night that they were missing from the club. These latent fingerprints were turned over to an expert technician whose qualifications were admitted by counsel for appellant. According to her testimony she was able to identify the latent prints left on the various items in the club with the known fingerprints of appellant and she testified that they were identical.

Other evidence technicians removed a .38 caliber bullet from the wall of the 2010 Club and from the home of Yarber. They also found spent cartridges at the scene of the double murder. A .38 caliber pistol was recovered from Lake Purdy along with two unspent .38 cartridges. The autopsy surgeon recovered three slugs from the body of Mr. White. All of these cartridges and slugs together with the .38 pistol were turned over to an expert to test-fire the pistol and make a microscopic comparison of the slugs removed from the club, from Yarber's home, and from the body of Mr. White. He testified that the microscopic comparison showed beyond doubt that each of these slugs was fired from this

particular .38 caliber pistol.

In short, the evidence adduced by the State weaved a web around appellant from which he was unable to extricate himself from his connection with this double murder.

[2] As we have pointed out the testimony of appellant and the testimony of Yarber given at the preliminary hearing were conflicting in the extreme. It was solely within the province of the jury, and not this Court, to determine the credibility of these two felons. Snipes v. State, 50 Ala.App. 139, 177 So.2d 413; Pugh v. State, 51 Ala.App.164, 283 So.2d 616; Waters v. State, 55 Ala. App. 646, 318 So.2d 342. Hall v. State, 50 Ala.App. 666, 282 So.2d 104.

In Stokley v. State, 254 Ala. 534, 49 So.2d 284, the Supreme Court held:

> "It is well established that when, by prearrangement or on the spur of the moment, two or more persons enter upon a common enterprise or adventure and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out, each is guilty of the offense committed, whether he did any overt act or not. This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting, or who is ready to aid, abet, or assist the other in the perpetration or commission of the offense, is a guilty participant, and in the eye of the law is equally guilty with the one who does the act. Such community of

purpose or conspiracy need not be proved by positive testimony. It rarely is so proved. The jury is to determine whether it exists, and the extent of it, from the conduct of the parties and all the testimony in the case. Morris v. State, 146 Ala. 66, 41 So. 274, and cases cited; Jones v. State, 174 Ala. 53, 57 So. 31; Teague v. State, 245 Ala. 339, 16 So.2d 877.

"When two or more persons enter upon an unlawful purpose, with a common intent to aid and encourage each other in anything within their common design, they are each responsible, civilly and criminally, for everything which may consequently and subsequently result from such unlawful purpose, whether specifically contemplated or not."

[3] This was a cold-blooded murder without any mitigating or extenuating circumstances. Two helpless and defenseless victims were robbed, kidnapped and shot to death. It does not matter which of the two men actually pumped the bullets into the bodies of Mrs. Knabe and Mr. White, they were both equally guilty of murder and must pay the penalty of the law.

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none.

The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

Ex parte Danny Ray MILES, alias
Danny Ray Mylar.

SC 2410

Supreme Court of Alabama.

April 1, 1977.

Certiorari to the Court of Criminal Appeals, 343 So.2d 801.

EMBRY, Justice.

WRIT DENIED.

TORBERT, C.J. and BLOODWORTH, JONES and ALMON, JJ., concur.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for The State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____ day of June, 1892, I did serve the the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, a/k/a Danny Ray Miles, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
Attorney At Law
1500 Brown-Marx Building
Birmingham, Alabama 35203

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150